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In The

Supreme Court of the United States

October Term, 1994

FRANK J. KELLEY, Attorney General of the State of Michigan on behalf of the Citizens of the State of Michigan; HERBERT P. READ; NORMAN W. PERMAN; SUSAN KIMMELMAN; THE LAKE MICHIGAN FEDERATION; and DON'T WASTE MICHIGAN,

Petitioners,

v.

IVAN SELIN; JAMES R. CURTISS; E. GAIL DEPLANQUE; FORREST J. REMICK; KENNETH C. ROGERS; UNITED STATES NUCLEAR REGULATORY COMMISSION; and UNITED STATES OF AMERICA,

Respondents,

CONSUMERS POWER COMPANY,

Intervenor/Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Sixth Circuit correctly determined, consistently with the Administrative Orders Review Act, 28 U.S.C. § 2344, and with applicable precedent, that to the extent petitioners were challenging the Nuclear Regulatory Commission's (NRC) 1990 regulation establishing a general license scheme pertaining to spent fuel storage casks, such a challenge was untimely because it was not filed within 60 days of the promulgation of the 1990 regulation, and, if not, whether petitioners were thereby prevented from having any of their substantive arguments considered and decided by the Court of Appeals.

2. Whether the Court of Appeals correctly determined, consistently with applicable precedent under Section 189 of the Atomic Energy Act, 42 U.S.C. § 2239, Section 4 of the Administrative Procedure Act, 5 U.S.C. § 553, and Sections 133 and 218(a) of the Nuclear Waste Policy Act, 42 U.S.C. §§ 10153 and 10198(a), that the NRC was not required to provide an "on-the-record" adjudicatory hearing in connection with an informal rulemaking that added one spent fuel storage cask to the existing list of approved casks in NRC's regulations at 10 C.F.R. Part 72, Subpart K.

3. Whether the Court of Appeals correctly determined, consistently with applicable precedent under the National Environmental Policy Act, 42 U.S.C. §§ 4321-4370 (NEPA), that the NRC was not required, under NEPA and 42 U.S.C. §§ 10153 and 10198(a), to conduct a "site-specific" environmental review or analysis in connection with an informal rulemaking that added one cask to the existing list of approved casks in NRC's regulations at 10 C.F.R. Part 72, Subpart K.

RULE 29.1

Respondent Consumers Power Company is a wholly-owned subsidiary of CMS Energy Corporation.

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OPINIONS BELOW

On January 11, 1995, the United States Court of Appeals for the Sixth Circuit denied a challenge to the 1993 rulemaking that added the VSC-24 ventilated storage cask to the list of casks, in 10 C.F.R. Part 72, Subpart K, approved by the Nuclear Regulatory Commission (NRC or Commission) for temporary storage of spent nuclear fuel at licensed reactor sites. *Kelley v. Selin*, 42 F.3d 1501 (6th Cir. 1995) (Pet. at 1a-40a). The 1990 NRC rulemaking cited by petitioners (Pet. at 1) was not on review before the Court below.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

In addition to the statutory and regulatory provisions cited by petitioners, 42 U.S.C. § 10153 (Nuclear Waste Policy Act) (App. 1) is also pertinent to this case. The full text of that statutory provision is included in the Appendix.

COUNTERSTATEMENT OF THE CASE

Petitioners' Statement of the Case omits and misstates important information concerning the factual and legal background and context of this case.

1. National Policy Concerning Spent Nuclear Fuel Disposal

Under the Nuclear Waste Policy Act of 1982, as amended, 42 U.S.C. § 10101 *et seq.* (NWPA), the Department of Energy is required to construct and license a federal repository for the permanent disposal of spent nuclear fuel from commercial nuclear power plants. Until this repository becomes operational, utilities that produce spent fuel are responsible for its storage, preferably at reactor sites. 42 U.S.C. § 10151(a)(1).

To encourage on-site storage, Congress directed the Secretary of Energy to establish a demonstration program

for dry storage of spent fuel at reactor sites to develop technologies that the NRC

> may, by rule, approve for use at the sites of civilian nuclear power reactors without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission.

42 U.S.C. § 10198(a) (Pet. at 57a-58a). The NWPA further directed the NRC to establish licensing procedures for any technology approved under the demonstration program mandated by 42 U.S.C. § 10198(a). 42 U.S.C. § 10153 (App. 1)

2. NRC's 1990 Rulemaking to Add Subpart K to 10 C.F.R. Part 72

Pursuant to this directive, the NRC promulgated 10 C.F.R. Part 72, Subpart K by informal notice and comment rulemaking in 1990 (55 Fed. Reg. 29,181 (1990); Pet. at 59a-66a). That regulation grants to holders of licenses of nuclear power reactors a "general license," *i.e.*, a license not requiring a specific application for approval and not requiring a hearing opportunity, to store, in pre-approved storage casks, spent fuel irradiated at that plant provided certain conditions are met. *See* Pet. at 5 n.3. The rule's rationale is that the approved cask designs will have been extensively reviewed to assure their suitability for use at all nuclear power reactor sites meeting certain specified criteria, those sites having been thoroughly analyzed as part of the reactor licensing process, during which an adjudicatory hearing opportunity would have been afforded. App. 69a. Petitioners brought no judicial challenge to that rulemaking.

3. Spent Fuel Storage at the Palisades Plant

Respondent Consumers Power Company (Consumers) is licensed by the NRC to operate the Palisades Plant, located on the shore of Lake Michigan near Covert,

Michigan. Many early nuclear power plants, including the Palisades Plant, were not designed to accommodate spent fuel generated over the entire operating life of the plant. For power generation to continue at Palisades, additional spent fuel storage was required in 1993 because there was no longer any additional space in the spent fuel pool.[1] Absent some additional storage capability, the only alternative was to permanently shut down the plant, 14 years before the end of the current license term.

After studying this problem, Consumers selected the "VSC-24" dry storage cask for additional storage of spent fuel outside of the spent fuel pool.[2] This storage system utilizes massive concrete and steel storage casks in which the spent fuel elements are placed. Each cask is sixteen feet tall, 29 inches thick, eleven feet in diameter, and weighs 130.1 tons when loaded. After loading, the concrete container is transported to a 2-3 foot thick concrete pad located on the plant site near the Auxiliary Building which houses the current spent fuel pool, but farther from Lake Michigan than the Auxiliary Building. The cask is ventilated by internal air flow paths which allow decay heat from the spent fuel to be removed by natural circulation around the metal basket wall. The system is

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[1] Contrary to petitioners' implication (Pet. at 3), the storage capacity of the Palisades spent fuel pool has been maximized, and there are no other technically feasible means of expanding storage capacity in the spent fuel pool.

[2] The selection of dry cask above-ground storage was consistent with Michigan law. In 1989, the Michigan Legislature endorsed above-ground spent fuel storage "at or near" nuclear power generating facilities, if approved by the NRC. Mich. Comp. Laws § 325.491 (1989); *Kelley*, 42 F.3d at 1505 n.1. Consumers also received a permit from the Michigan Department of Natural Resources (DNR) for construction of the concrete pad on which the storage casks would be located. DNR Permit No. 90-VB-100-SC.

designed to withstand tornadoes, fire, extreme temperature, and impact from projectiles (*e.g.*, a speeding car).

In March 1990, Consumers submitted an application to the NRC under 10 C.F.R. Part 72 for a site-specific license to use the VSC-24 casks at Palisades. At the time, the Subpart K general license had not been issued by the NRC, and site-specific licensing was the only option available to Consumers. However, in July 1990, the NRC finalized the Subpart K rulemaking, and Consumers withdrew the specific license application, opting to utilize the general license. At that time, the VSC-24 cask was not on the list of approved casks for use under the general license, but the cask vendor had begun the NRC approval process.

It was no secret that Consumers sought to take advantage of the Subpart K general license scheme for the VSC-24 cask at Palisades. Consumers advised the NRC by letter that

> We believe the need for a site-specific proceeding is mooted by adoption of the new rule. Accordingly, this is to notify you that the Company hereby withdraws its March 9, 1990 application, and that it intends to utilize the general license granted in new Subpart K when it is able to satisfy the conditions of the general license. By copy of this letter, we are so advising all those whose intervention petitions we have received.

(App. 2-3).[3] A copy of this letter was placed in the NRC's public document rooms and sent by Consumers to all petitioners who requested a hearing on Consumers' application. Therefore, petitioners Kelley (who has, as Michigan Attorney General, closely followed matters

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[3] This letter is not part of the administrative record on review. Consumers cites it only to correct the erroneous impression left by petitioners that they had no reason to believe the 1990 rulemaking would apply to them.

relating to the Palisades Plant for years) and Don't Waste Michigan (which was on the service list for NRC's notice that the Part 72 application had been withdrawn) had every reason to know of Consumers' intent to "utilize the general license" and to believe that the 1990 regulations would directly affect them. Thus, petitioners' claim that "none of the Petitioners had reason, at that time, to challenge the 1990 regulations" (Pet. at 5), is false.

4. Addition of the VSC-24 Cask to the List of Approved Casks in Subpart K

On April 7, 1993, the NRC published a final rule that added the VSC-24 cask to the list of casks approved for use at U.S. reactor sites under certain conditions. 58 Fed. Reg. 17,948 (1993). Publication of the rule followed a 75-day comment period, 57 Fed. Reg. 28,645 (1992), which was later extended by 30 days, 58 Fed. Reg. 5,301 (1993), as well as an informal public meeting. The rule was supported by a lengthy Federal Register notice that provided extensive technical and legal responses to issues raised in public comments on the rule, including comments by petitioners.

The final rule was also supported by an Environmental Assessment (EA) and finding of no significant impact. (6th Cir. J.A. 741) The EA considered the effects of operation of the VSC-24 casks, and concluded that no change in environmental impact was anticipated because the rulemaking did not change existing NRC safety and environmental requirements for spent fuel storage and because cask users would still have to meet those requirements. The EA was explicitly tiered, *see* 40 C.F.R. § 1508.28, on numerous prior environmental analyses relating to spent fuel storage. *See Kelley*, 42 F.3d at 1519-20.

In preparation for spent fuel storage in the VSC-24 casks at Palisades, Consumers reviewed the Palisades Security and Emergency Plans and made changes to those

plans to address the inclusion of the storage cask installation within the Palisades Protected Area, pursuant to 10 C.F.R. §§ 50.54(p) and (q). Neither change necessitated an amendment to the operating license for the Palisades Plant. Changes to these plans are routine and, pursuant to NRC regulations, are routinely made by power reactor licensees without prior NRC approval. Petitioners did not seek to challenge either of those changes before the NRC.

5. Proceedings Below

On May 4, 1993, petitioners Kelley, Lake Michigan Federation (LMF), Read, Perman, and Kimmelman filed an action in the U.S. District Court for the Western District of Michigan seeking an injunction against the implementation of the 1993 VSC-24 rulemaking. Consumers was admitted to the suit as an intervenor-defendant. On May 10, the district court ruled that it lacked jurisdiction over the lawsuit and transferred the case to the Sixth Circuit. Pet. at 41a-52a; 53a-54a.

Petitioners Kelley, LMF, Read, Perman, and Kimmelman appealed the District Court's decision. Petitioners Kelley, LMF, and Don't Waste Michigan also filed a petition for review of the VSC-24 rulemaking in the Sixth Circuit on June 4, 1993; petitioners Kelley and LMF filed a second petition for review of that same rulemaking on July 9, 1993. Consumers was allowed to intervene as a respondent with respect to both petitions.

Petitioners argued in the case below that (1) an amendment to the Palisades operating license was required, which could not be granted without an adjudicatory hearing opportunity, although petitioners could point to no provision in the license that needed amending; (2) the NWPA did not authorize the elimination of such "hearing" rights; (3) certain routine "site-specific" decisions at the Palisades Plant also triggered adjudicatory hearing rights; and (4) a "site-specific" environmental analysis was required because of the decision to use

the VSC-24 cask at the Palisades Plant. Petitioners' challenge to the 1990 "framework of Subpart K as applied concretely to them in 1993" (Pet. at 8) was confined to a footnote in their brief, in which petitioners claimed that they could challenge "the validity of certain aspects of the 1990 rule." Petitioners did not name one specific aspect of the 1990 rule that they sought to challenge.

6. Post-Filing Issues

Petitioners incorrectly assert that "extraordinary events" occurring after briefing have undermined the NRC's legal position. Pet. at 9. These "events" were completely irrelevant to the disposition of the legal issues presented in the case below. The first so-called "event" was a letter from an employee of the U.S. Environmental Protection Agency (EPA) who requested environmental documentation concerning the use of the VSC-24 at Palisades, and claimed that a site-specific environmental analysis was required (Pet. at 66a-67a). This EPA employee was apparently unaware that copies of the relevant environmental documentation concerning the VSC-24 cask had been sent to his office six months previously. *See* Pet. at 68a-71a. The NRC wrote a letter to the EPA employee that explained the NRC's comprehensive approach to satisfying its responsibilities under NEPA in this case. *Id.* The EPA employee was apparently satisfied by the NRC's response, since he took no further action.

The second so-called "event" concerned an analysis by Consumers and an independent review by the NRC of the stability of the soil underneath the concrete storage pad on which the casks are placed at Palisades, in response to a concern expressed in a handwritten note from a member of the NRC's technical staff. Both reviews concluded that the soil underneath the storage pad would support the pad in the event of any earthquake or flood that is conceivable for the Palisades site. (App. 4-6)

Finally, petitioners cite Consumers' identification of flaws in welds in a steel basket of one of the casks that

had been loaded with spent fuel. Pet. at 11. After identifying the flaws, Consumers concluded, and NRC concurred, that they posed no safety issue. Nonetheless, Consumers has decided, as a conservative measure, that it will unload that cask and reload it later this year. There is no basis for petitioners' suggestion that the cask has not been unloaded because it is unsafe to do so. Indeed, the source cited by petitioners, a letter from the NRC, stated exactly the *opposite* of petitioners' conclusion: "[t]here are no serious questions regarding the unloading procedure." Pet. at 80a.[4] In any event, none of these matters required an amendment to the Palisades operating license. These issues were properly ignored by the Sixth Circuit as irrelevant to the legal issues before the Court.

7. The Sixth Circuit's Decision

A panel of the Sixth Circuit unanimously rejected petitioners' arguments and denied the petitions for review.[5] The Court ruled that it was within the NRC's discretion to select rulemaking as the procedural vehicle

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[4] We note that petitioners moved the Sixth Circuit to supplement the administrative record with some of the documents concerning post-briefing issues referenced by petitioners that were clearly not part of the administrative record on review (Pet. at 66a-67a, 72a, 73a-76a). This motion was denied, a decision that petitioners do not challenge. In addition, petitioners have included a newspaper article in the appendix (Pet. at 84a-88a). This article should be disregarded or stricken because it is outside the administrative record, *Camp v. Pitts*, 411 U.S. 138 (1973), it contains unreliable and self-serving hearsay, *see Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 618 n.19 (1974), and is in any event irrelevant to this case.

[5] The Sixth Circuit also rejected Consumers' argument that none of the petitioners had standing to challenge the 1993 VSC-24 cask rulemaking, holding that at least some of the petitioners did in fact have standing. *Kelley*, 42 F.3d at 1508-10.

for approving spent fuel storage technologies, and the NRC afforded the public "an extensive opportunity to comment" on the proposed rulemaking. *Kelley*, 42 F.3d at 1512. The Court also upheld the NRC's technical determinations that proposed changes to the Palisades Emergency and Security Plans did not require a license amendment. *Id.* at 1517.

The Court further found that no site-specific NEPA review was required, holding that the EA prepared by the NRC was sufficient, and that it was properly "tiered" on a series of previously issued environmental analyses on dry cask storage of spent nuclear fuel. *Id.* at 1519. The Court concluded by noting that "the Congressional policy embodied in the NWPA was to provide to the NRC a basis to approve various dry storage technologies for use at civilian nuclear power reactors without site-specific hearings." *Id.* at 1521. The Court characterized petitioners' claims as an attack on the Congressional policy choice to encourage licensing of spent nuclear fuel storage technologies by rulemaking. *Id.*

The Court rejected, in a footnote, the suggestion that petitioners could properly challenge the 1990 Subpart K rulemaking, stating that petitioners should have asserted their claims within the 60-day period prescribed by the Administrative Orders Review Act (commonly known as the Hobbs Act), 28 U.S.C. § 2344. *Kelley*, 42 F.3d at 1515 n.3. The Court nevertheless addressed the merits of each argument made by petitioners.

REASONS FOR DENYING THE WRIT

Petitioners seek certiorari in this case on three primary grounds. First, petitioners assert that the Sixth Circuit improperly concluded that, if petitioners were actually challenging the NRC's 1990 Subpart K rulemaking, their challenge was untimely under the Hobbs Act. Pet. at 13-20. Second, petitioners seek review to determine whether the Sixth Circuit improperly allowed the NRC, acting pursuant to the NWPA, to add the VSC-24

cask to the list of approved spent fuel storage casks without affording petitioners an opportunity for an adjudicatory hearing under the AEA. *Id.* at 20-26. Finally, petitioners claim that this Court's intervention is needed to correct the Sixth Circuit's error in allowing the NRC to approve the VSC-24 cask by rulemaking without performing a "site-specific" environmental review pursuant to NEPA. *Id.* at 26-29. Despite petitioners' strained attempts, they have failed to raise a certworthy issue.

While petitioners claim that the issues they raise "implicate[ ] critically important questions of law and public policy," Pet. at 12, this is a routine administrative law case in which the Sixth Circuit engaged in a straightforward analysis of relevant statutes and correctly applied well-settled precedent. Indeed, as to the merits of the dispute that is at the heart of this case – *i.e.*, whether the NRC may approve the addition of the VSC-24 casks for use, under the NRC's general license, at nuclear power plant sites – petitioners have offered nothing which would call the Sixth Circuit's analysis or conclusions into question. As to this dispositive legal issue, petitioners have not even alleged either a split in the circuits or a conflict with this Court's precedent. Apparently recognizing this fatal deficiency, petitioners purport to discern, in the footnotes and minutiae of the Sixth Circuit's opinion, circuit splits or conflicts with the decisions of this Court. Even if such circuit splits or conflicts with precedent actually exist – which they do not – this case presents an inappropriate vehicle for resolving such disagreements because their resolution would not change the Sixth Circuit's ultimate conclusion rejecting petitioners' challenge to the VSC-24 cask rulemaking.

In addition, because the Sixth Circuit applied settled administrative law precedent (the validity of which petitioners do not attempt to dispute), nearly every argument that petitioners make is tied to their disagreement with the NRC's resolution of fact-specific matters and technical issues pertaining to the VSC-24 cask rulemaking. Such

matters, however, are of the type that are correctly left, under this Court's decisions, to the informed discretion of an expert agency. More importantly, these matters implicate no far-reaching or generally applicable principles of law. Thus, the petition, stripped of its rhetoric, does not call for the resolution of any important legal principles which are of general applicability or about which there is either a split in the circuits or a conflict with the precedent of this Court.[6]

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[6] Consumers argued before the Sixth Circuit that none of the petitioners had standing to advance their arguments before that Court. The Sixth Circuit disagreed, holding that petitioners Read, Perman, and Kimmelman (the "landowners") had alleged sufficient injury to establish standing. *Kelly*, 42 F.3d at 1508-10. Assuming *arguendo* that the Sixth Circuit's standing analysis was correct for that Court, it is even clearer that none of the petitioners has standing to advance their claims in *this* Court. *See, e.g., Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 (1979) (the issue of standing may be raised at any time). The landowners were parties to only two of the four dockets that were consolidated before the Sixth Circuit: Docket No. 93-1710 (the appeal from the district court's decision that it lacked jurisdiction over petitioners' challenge) and 93-1646 (the case transferred from the district court to the Court of Appeals). The Sixth Circuit rejected Consumers' argument that petitioners had abandoned their appeal from the district court's jurisdictional decision. While Consumers believes that the Sixth Circuit erred in this regard, we note that the Sixth Circuit affirmed the district court's conclusion that it lacked jurisdiction, *Kelley*, 42 F.3d at 1509 n.2, and that petitioners have not objected to that decision in this Court. Thus, regardless of whether petitioners' appeal on the jurisdictional question was abandoned before the Sixth Circuit, it has surely been abandoned here. Moreover, the claims raised by petitioners in both 93-1710 and 93-1646 are moot. The only relief sought in those actions was an order enjoining the NRC from taking "further steps" to permit the loading of the casks at Palisades. Because the VSC-24 rule was allowed to become final and effective, however, there simply are no "further steps" that the NRC has to take to permit loading. For this

I. PETITIONERS HAVE NOT RAISED A CERTWORTHY ISSUE WITH RESPECT TO THE SIXTH CIRCUIT'S DETERMINATION THAT PETITIONERS MAY NOT CHALLENGE THE 1990 SUBPART K RULEMAKING.

The issue that petitioners believe is most worthy of this Court's review was addressed in a footnote in the Sixth Circuit's decision. In the course of painstakingly addressing all of petitioners' arguments, the Sixth Circuit observed that some of those arguments "appear to claim that portions of the NRC's 1990 [Subpart K] rulemaking are invalid." *Kelley*, 42 F.3d at 1515 n.3. The Sixth Circuit indicated, however, that it could not reach any such claim, because petitioners should have asserted such a claim within sixty days following the promulgation of the 1990 regulation, as required by the Hobbs Act. *Id.* (citing 28 U.S.C. § 2344). Petitioners claim that the Sixth Circuit erred in failing to recognize (1) that any challenge within the Hobbs Act's 60-day review period may not have been ripe, and (2) that review of the 1990 regulation in connection with their timely challenge to the 1993 VSC-24 cask rulemaking should have been allowed under the so-

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reason, there is no basis for a claim of standing by the landowners. This leaves only the remaining parties, Kelley, LMF, and Don't Waste Michigan, as petitioners. Petitioner Kelley bases his standing on his authority to act on behalf of the people of Michigan to protect their interests – *i.e.*, a *parens patriae* argument. It is well settled, however, that a state cannot assert *parens patriae* standing in a suit against the federal government. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982); *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923). As for Don't Waste Michigan and LMF, neither of these organizations has satisfied this Court's requirements for demonstrating that they, or any identified members they may have, have any concrete interest that could be affected in this action. *See Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990).

called "reopener" doctrine. Pet. at 13-20. Petitioners' attempt to elevate a straightforward discussion of settled law in a footnote into an important legal error is unavailing.

1. Significantly, petitioners nowhere attempt to explain how they were harmed by the Sixth Circuit's analysis of whether they could challenge the 1990 Subpart K rulemaking. Nor do they even attempt to demonstrate how that analysis affected the outcome of their challenge to the 1993 rulemaking This omission is not accidental. Petitioners *cannot* explain how the Sixth Circuit's analysis of this Hobbs Act issue changed the result of this case because the Sixth Circuit's analysis of that issue did not cause it to overlook any of petitioners' arguments.

The simple fact is that the Sixth Circuit considered, and painstakingly addressed, every single argument raised by petitioners in their appellate briefs. Petitioners mounted a broad-based attack on the NRC's authority, under the AEA and NEPA, to generically approve, without site-specific adjudicatory hearings and environmental reviews, spent fuel storage casks under the general license scheme. The Sixth Circuit considered and rejected this attack in its entirety and did not fail to address any aspect of it because it fell within the scope of the 1990 rule, as opposed to the 1993 rule. Indeed, petitioners themselves recognized that this artificial distinction between the 1990 and 1993 rule was of no moment since they maintained below that "[p]etitioners' argument is not in any case contingent on any challenge to the 1990 rule." Reply Brief at 16. Petitioners, therefore, can point to no prejudice that they may have suffered as a result of the Sixth Circuit's observation that any challenge to the 1990 rulemaking would be untimely. Petitioners are essentially seeking a purely advisory opinion on this issue. Even if their arguments are correct, the most that petitioners could hope to achieve is the removal of the offending footnote from the court's opinion. Clearly, this

case presents an unacceptable vehicle for the consideration of the issues raised by petitioners.

2. Petitioners characterize their dispute with the Sixth Circuit's analysis of their ability to challenge the 1990 Subpart K rulemaking as raising a question under the ripeness doctrine. Pet. at 14-18. Thus, petitioners suggest that the Sixth Circuit's analysis conflicts with this Court's decisions in *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990) and *Reno v. Catholic Social Servs.*, 113 S. Ct. 2485 (1993), because those cases compel the conclusion that a timely challenge to the 1990 rulemaking would have failed on ripeness grounds. Pet. at 14-18.

Notwithstanding petitioners' exertions in this regard, however, this is *not* a ripeness case. No party has argued, and the Sixth Circuit has not held, that petitioners' lawsuit was not ripe. The ripeness doctrine is an analytical tool for determining whether a lawsuit challenging agency action has been filed too *early*. *See Abbott Labs. v. Gardner*, 387 U.S. 136 (1967). Petitioners' problem in this case, however, is that, to the extent petitioners wish to challenge the 1990 Subpart K rulemaking, they filed their petition several years too *late*.

Petitioners argue that, under *Lujan* and *Reno*, they *may* have faced a ripeness obstacle *if* they had sought to challenge the 1990 Subpart K rulemaking.[7] It is thus apparent that what petitioners desire this Court to do is answer a purely hypothetical question: if petitioners had challenged the 1990 rule in 1990, would their challenge have been dismissed on ripeness grounds? While petitioners' hypothetical may be intellectually intriguing, it does not present an acceptable posture in which to decide a ripeness issue. Nor is the resolution of that question likely to have any kind of far-reaching significance that

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[7] Petitioners never explain how this Court's decision in *Reno*, which was not issued until 1993, could have led them to believe, in 1990, that a timely petition for review of the 1990 rulemaking would have been dismissed on ripeness grounds.

would justify this Court's review. Petitioners have presented no justification for this Court to reach out to decide a ripeness question in a case that was not decided on ripeness grounds and that thus does not squarely present such an issue. "Courts simply are not well-suited to answering hypothetical questions which involve guessing what the court might have done in the past." *Eagle-Picher Indus. v. EPA*, 759 F.2d 905, 914 (D.C. Cir. 1985).

The D.C. Circuit has aptly stated the problems which are presented when a petitioner who has failed to bring suit within a statutorily prescribed period seeks, after the fact, to be relieved of the consequences of his failure by raising a ripeness justification:

> As an initial matter, we think that the petitioners confound the obligations of the court with those of petitioner. It is the duty of the court to make the prudential judgment whether a challenge to agency action is ripe; it is the responsibility of petitioners to file for review within the period set by Congress.

Eagle-Picher, 759 F.2d at 912. Allowing a late-filing petitioner to evade the consequences of his tardiness by substituting his own self-serving and post-hoc rationalizations for the ripeness determination which should properly have been made by a reviewing court serves neither the policies and purposes addressed by the ripeness doctrine nor the interests that Congress has sought to protect by enacting timely filing requirements such as the one found in the Hobbs Act. *Id.* at 913. *See also Waste Management of Ill., Inc. v. EPA*, 945 F.2d 419, 422 (D.C. Cir. 1991).

In any event, petitioners' attempt to manufacture a conflict between the Sixth Circuit's analysis and this Court's decisions in *Lujan* and *Reno* simply cannot succeed. The ripeness analysis in both of those cases was premised upon the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* (APA). Thus, neither case involved a ripeness analysis under a statute, such as the Hobbs Act, which governs

here and specifically authorizes immediate judicial review of regulations. In fact, this Court in *Lujan* took pains to make clear that its ripeness analysis had no applicability in the context of cases brought under judicial review provisions such as the one found in the Hobbs Act:

> Under the terms of the APA, respondent must direct its attack against some particular "agency action" that causes it harm. Some statutes permit broad regulations to serve as the "agency action," and thus to be the object of judicial review directly, *even before the concrete effects normally required for APA review are felt. Absent such a provision,* however, a regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions . . . .

Lujan, 497 U.S. at 891 (emphasis added).

Petitioners' answer to the proposition that *Lujan* unequivocally excepted statutes like the Hobbs Act from its ripeness analysis is to raise another purely hypothetical issue, this time regarding the case or controversy requirements of Article III. Petitioners suggest that not only would they have run afoul of the prudential aspects of the ripeness doctrine had they attempted to challenge the 1990 Subpart K rulemaking in 1990, but they also may have failed to raise a proper "case or controversy" under Article III if they had complied with the Hobbs Act's judicial review provisions. Pet. at 16-17. This argument, however, does not demonstrate that the Sixth Circuit's analysis conflicted in any way with *Lujan* or *Reno*. If anything, petitioners' endless hypothesizing demonstrates how its claims are clearly *not* worthy of Supreme Court review.[8]

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[8] Moreover, the bizarre posture in which any ripeness and/or Article III questions would need to be reviewed if this Court were to grant review on the issues raised by petitioners argues

Finally, the simple fact is that petitioners *could* have brought a timely challenge to the 1990 rule. Contrary to petitioners' suggestion, Pet. at 17, such a challenge would not have raised a dispute in which the controversy was "only hypothetical." The dispute would have been quite real. As the Sixth Circuit observed, "the NRC's 1990 rule had an immediate impact. After promulgation of the rule, the very procedures about which petitioners now complain were in place, and any civilian reactor in the nation, including Palisades, was free to use the approved storage systems." *Kelley*, 42 F.3d at 1515 n.3. Moreover, petitioners were on notice that Consumers intended to take advantage of the general license issued by the 1990 rule. *See supra* at 4-5. Petitioners are therefore being disingenuous when they state that they did not have "reason, at that time, to challenge the 1990 regulations," Pet. at 5.[9] Not

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strongly against allowing review at this time. If petitioners are to succeed with respect to this issue, they would have to argue that they would have been unable to present a ripe, justiciable, case or controversy had they attempted to file suit in 1990. Respondents, on the other hand, would need to argue that a suit filed at that time would have met all ripeness and Article III requirements. Such a line-up of parties and arguments would represent a radical departure from the typical roles played by petitioners and agency respondents in these types of cases. The petitioners would be arguing *against* their own ability to bring a lawsuit; and the agency respondent would be arguing *in favor* of petitioners' ability to raise their claims. Such weighty and complex issues as ripeness and the requirements of Article III should not be resolved in such a context.

[9] For the same reason, petitioners misstate the facts when they claim that it was in June of 1992 that Consumers "provided notice, *for the first time*, that once the VSC-24 was added to the approved list of casks in Subpart K, it intended to use the VSC-24 casks under the general license." Pet. at 6 (emphasis added).

only did they have such a "reason," they also unquestionably would have satisfied the standing requirements of Article III had they attempted to act on that reason.

3. Petitioners next suggest that there is disagreement between the Sixth Circuit and the D.C. Circuit with respect to the so-called "reopener" doctrine. Pet. at 18-20. This is plainly untrue. The Sixth Circuit noted petitioners' argument, based upon D.C. Circuit precedent, that out-of-time challenges to regulations may be allowed where the agency has by some new promulgation "reopened" its analysis of the question resolved in the prior regulation. *Kelley*, 42 F.3d at 1515 n.3. The Sixth Circuit held, however, that these reopener cases had "no bearing" on its consideration of petitioners' claims because the NRC had not in fact "reopened" the approach to the general licensing of spent fuel storage casks in the 1990 Subpart K rulemaking. *Id.*

The Sixth Circuit did not in any way dispute the validity of the reopener doctrine or otherwise depart from D.C. Circuit precedent on this point. Petitioners' real quarrel is with how the Sixth Circuit *applied* those principles in this case. The Sixth Circuit's application of those principles, based upon the specific facts surrounding the NRC's actions in this case, does not raise such an important issue of general applicability that it deserves this Court's consideration. This is especially so since, as noted above, the Sixth Circuit's analysis on this issue had absolutely no bearing upon the outcome of this case.

In any event, the Sixth Circuit unquestionably correctly applied the principles underlying the reopener doctrine. The 1990 Subpart K rulemaking expressly contemplated that new casks would be added to the approved list as their designs were reviewed and certified by the NRC. The fact that, in 1993, the NRC employed its rulemaking procedure to add the VSC-24 cask to the list of approved spent fuel storage casks is in no way a reopening or a reconsideration of its 1990 Subpart K rulemaking. In the 1993 rulemaking, the NRC

solicited comments solely with respect to its proposal to amend the regulations in order to add the VSC-24 casks to the general license. In short, there are no indications that any aspect of the 1990 Subpart K rulemaking "was *in fact* reopened," or "*in fact* reconsider[ed]." *Public Citizen v. NRC*, 901 F.2d 147, 150 (D.C. Cir.), *cert. denied*, 498 U.S. 992 (1990) (emphases added). The mere fact that, in responding to comments on the 1993 VSC-24 cask rulemaking, the NRC responded to comments that addressed whether the NRC should hold an adjudicatory hearing before allowing use of the VSC-24 cask at Palisades in no way indicates that the NRC reconsidered the general license scheme promulgated in 1990.

> The "reopening" rule of [*Ohio v. EPA*, 838 F.2d 1325 (D.C. Cir. 1988)] is not a license for bootstrap procedures by which petitioners can come in on matters other than those actually at issue, goad an agency into a reply, and then sue on the grounds that the agency has re-opened the issue.

Public Citizen, 901 F.2d at 150 (quoting *American Iron & Steel Inst. v. EPA*, 886 F.2d 390, 398 (D.C. Cir. 1989), *cert. denied*, 497 U.S. 1003 (1990)).

II. THE SIXTH CIRCUIT'S DECISION CONSTRUING SECTION 189(a) OF THE ATOMIC ENERGY ACT IS ENTIRELY CONSISTENT WITH THE DECISIONS OF THE D.C. CIRCUIT AND CORRECTLY APPLIES THE NUCLEAR WASTE POLICY ACT

Petitioners maintain that this Court should review the question whether the NRC was obliged to allow Petitioners to voice their complaints about the proposed spent nuclear fuel cask in a full-blown, trial-type hearing, rather than through the "notice and comment" rulemaking (and informal hearings) that the NRC provided to them. The Sixth Circuit's determination that the NRC had no such legal obligation was simply a straightforward application of the well-settled rule that agencies are free to choose the most appropriate procedural mechanism,

absent an explicit statutory directive from Congress. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543 (1978); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). Petitioners do not deny the applicability of this general rule, nor do they point to any congressional directive, or even any NRC regulation, mandating the trial-type adjudicatory hearing they demand. Petitioners certainly cannot point to any federal court decision applying a different legal standard concerning the availability of an NRC adjudicatory hearing, either as a general interpretation of the AEA or in the specific context of the NWPA. Accordingly, when stripped to its essentials, the sum total of Petitioners' argument is that the NRC abused its discretion in the particular circumstances of this case, because the changes to procedures at the Palisades plant were sufficiently momentous to warrant a trial-type hearing and were not amenable to resolution through generic rulemaking. Even assuming *arguendo* that the NRC had so abused its discretion, and assuming further that federal courts are authorized to second-guess the NRC's judgment on these technical and procedural questions, this inherently fact-bound issue does not raise a legal question of general applicability or importance.

Petitioners boldly assert that there are "express statutory limits on the NRC's generic licensing powers, which the Sixth Circuit has disregarded." Pet. at 23. Petitioners, however, fail to cite any statutory language creating this limitation, or to point to any statute or regulation which in any way circumscribes the NRC's power under *Vermont Yankee* to choose rulemaking over adjudication and to resolve "site-specific" factual questions through a more informal process than a cumbersome trial-type hearing.

It is settled law that the NRC's general enabling statute – the Atomic Energy Act – does not require that the NRC proceed by an adjudicatory hearing. While Section 189(a) of the AEA requires a "hearing" where there is an "issuance or modification of rules and regulations

dealing with the activities of licensees," 42 U.S.C. § 2239(a), it does not require a hearing "on the record." Accordingly, it is black letter law that the "notice and comment" rulemaking proceeding provided here satisfies the statutory standard; a formal adjudicatory hearing is not required.[10]

Moreover, the NWPA, the statute covering the specific question of on-site spent nuclear fuel storage, certainly does not contemplate any adjudicatory hearing beyond that specifically mandated by the AEA. To the contrary, Section 133 of the NWPA, 42 U.S.C. § 10153, specifically directs that:

> The Commission shall, *by rule*, establish procedures for the licensing of any technology approved by the Commission under Section [218(a)] for use at the site of any civilian nuclear power reactor. (Emphasis added).

Similarly, Section 218(a) of the NWPA, 42 U.S.C. § 10198(a), provides in pertinent part that:

> [t]he Secretary shall establish a demonstration program . . . for the dry storage of spent nuclear fuel at civilian nuclear power reactor sites, with the objective of establishing one or more technologies that the Commission may, *by rule*, approve for use at the site of civilian nuclear power reactors *without, to the maximum extent practicable, the need for additional site-specific approvals by the Commission*. (Emphasis added).

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[10] *See* 5 U.S.C. § 553(a); *United States v. Florida E. Coast Ry. Co.*, 410 U.S. 224, 238 (1973); *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 757 (1972); *Camp v. Pitts*, 411 U.S. 138, 140-41 (1973); *Siegel v. AEC*, 400 F.2d 778, 783 (D.C. Cir. 1968).

Thus, the plain language of the statute, as well as its legislative history,[11] clearly directs the NRC to license, by rule, dry storage of spent fuel at all reactor sites, while avoiding, to the maximum extent practicable, time-consuming and costly site-specific adjudicatory hearings of the sort petitioners demand.

Nor does any NRC regulation require a trial-type adjudication in the circumstances presented here. It has been the NRC's long-standing administrative practice to grant an adjudicatory hearing opportunity to evaluate *amendments* to a reactor's operating *license*. If there is a change to the actual text of the operating license, or the license will be effectively amended because the licensee proposes modifications to the plant that present new types of safety questions that have not previously been reviewed, then a hearing opportunity is triggered under NRC regulations. *See* 10 C.F.R. § 50.59; *Kelley*, 42 F.3d at 1515-16. If, however, proposed plant changes do not pose unreviewed safety questions requiring a license amendment, the NRC regulations sensibly do not evaluate such minor "site-specific" issues through a burdensome public hearing, but through less formal oversight procedures. *Id.*

There is no disagreement among the lower federal courts, or even among the parties here, concerning either these black-letter administrative law principles or the straightforward statutory and regulatory procedural

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[11] *See, e.g.*, H.R. Rep. No. 491, 97th Cong., 2d Sess. at 39-40, *reprinted in* 1982 U.S.C.C.A.N. at 3804-06:

> Many utilities . . . are not willing to be the first to go through licensing since there is the potential for extended licensing proceedings. This is due to the practice of prenoticing and extensive hearings which allow many opportunities for intervention and delay which not only frustrate their nuclear objectives but also carry over into rate making hearings . . . Licensing relief via legislation to deal with this problem is needed . . . .

requirements. Petitioners' sole complaint is that the NRC misapplied its own regulations by not finding that minor changes at the Palisades site to install and maintain the new VSC-24 cask were of sufficient magnitude to constitute a license amendment requiring an adjudicatory hearing. The court below properly refused to second-guess either the agency's judgment on how to interpret and enforce its own procedural regulations or its highly technical, fact-bound determination that the minor changes at Palisades did not present unreviewed safety questions requiring a license amendment. *Kelley*, 42 F.3d at 1515.

This decision is unquestionably correct. The federal courts properly give special deference to both an agency's interpretation of its own procedural rules and to the extraordinarily technical, scientific determinations that fall within the NRC's unique expertise.[12] Here, the Sixth Circuit painstakingly examined each of the petitioners' unsubstantiated allegations that there remained unreviewed safety questions requiring a license amendment and correctly determined that "[t]he NRC had clearly reviewed the issues" in either the general rulemaking or prior licensing hearings. *Kelley*, 42 F.3d at 1516.[13]

This conclusion is hardly surprising. In its rulemaking, the NRC made the unchallenged determination that the VSC-24 cask was safe and environmentally sound at

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[12] *See Vermont Yankee*, 435 U.S. at 543-44; *Thomas Jefferson Univ. v. Shalala*, 114 S. Ct. 2381, 2386 (1994) ("[w]e must give substantial deference to an agency's interpretation of its own regulations"); *Baltimore Gas & Elec. Co. v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 103 (1983) (the NRC is "making predictions, within its area of special expertise, at the frontiers of science. When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential.").

[13] Petitioners did not attempt to point to any provision of the Palisades operating license which they maintained had been modified in order to store and maintain the VSC-24 casks.

every nuclear reactor site in the country that meets certain regulatory criteria.[14] That being so, it would be the rare case where the relatively straightforward procedures for using this cask would raise new environmental or safety issues at a nuclear reactor site which had previously been extensively reviewed to ensure its overall safety. In any event, even assuming *arguendo* that the NRC made some gross and obvious error in its technical judgment on the presence of such unreviewed safety questions at the Palisades site, this alleged "site-specific" factual mistake cannot, by definition, raise any legal issue of general applicability or interest.

Apparently recognizing this, petitioners seek to dress up their fact-bound challenge to the NRC's technical judgment at Palisades as implicating some broader legal question of administrative procedure, where the court below allegedly applied a different standard than this Court and the D.C. Circuit. Specifically, petitioners seem to argue that the D.C. Circuit in two decisions – *Nuclear Info. Resource Serv. v. NRC*, 969 F.2d 1169 (D.C. Cir. 1992) (*en banc*) (NIRS); and *Union of Concerned Scientists v. NRC*, 735 F.2d 1437 (D.C. Cir. 1984) (*UCS I*), *cert. denied*, 469 U.S. 1132 (1985) – held that the AEA requires adjudicatory hearings on all "site-specific" factual issues. Pet. at 22. They further claim that these decisions "directly follow" from this Court's decision in *Heckler v. Campbell*, 461 U.S. 458, 467 (1983), where the Court recognized that a statutory scheme which "contemplates that disability hearings will be individualized determinations based on evidence adduced at a hearing . . . does not bar the [agency] from relying on rulemaking to resolve certain classes of issues."

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[14] Petitioners do not allege any substantive deficiency in the agency's determination concerning the casks' safety and soundness. They challenge only the procedure used to evaluate the installation and maintenance of this cask at the particular nuclear reactor site.

As the Court below expressly recognized, however, these uncontroversial rulings on the extent to which an agency may use generic rules to supplant individualized factual adjudication *when such individualized adjudication is statutorily required* has nothing to with the issue in this case: whether an individualized adjudicatory hearing is required in the first instance. *Kelley*, 42 F.3d at 1510. The cases cited by petitioners *enhance* agencies' administrative flexibility by creating a common sense exception to a statutory requirement for case-by-case adjudicatory hearings, so that the agency need not "relitigate issues that may be established fairly and efficiently in a single rulemaking proceeding." *Heckler*, 461 U.S. at 467. As petitioners correctly note, the D.C. Circuit in *USC I* held that this exception cannot swallow the rule. An agency cannot evade statutorily-required adjudication by using rulemaking to resolve issues that truly do "require case-by-case consideration" and thus limit "the statutory hearings . . . to such a degree that they become meaningless." *Heckler*, 461 U.S. at 467; Pet. at 25. But the fact that an agency may not use the *Heckler v. Campbell* exception to avoid statutorily-mandated adjudication of genuine "site-specific" issues hardly can be converted into a rule that *every* "site-specific" issue – no matter how trivial – must be resolved through trial-type adjudication, in the absence of a statutory mandate to do so.

As the court below explained, *UCS I* stands only for the proposition that, *if* an adjudicatory hearing is required because a license is being issued or amended, then the NRC may not exclude material "site-specific" issues from that hearing. That decision did not – and could not under *Vermont Yankee* – purport to create some judicially-imposed requirement for adjudicatory hearings on *all* "site-specific" changes, even if those changes fall short of constituting a license amendment. Consequently, *UCS I* in no way requires a hearing in this case because

"[t]here is no licensing decision being made here." *Kelley*, 42 F.3d at 1515.[15]

Petitioner concedes that the Sixth Circuit so distinguished *UCS I*, but maintains that the changes at Palisades do, in fact, "amount to licensing activity." Pet. at 25. Again, however, this merely reflects petitioners' disagreement with the technical, procedural judgments of the NRC and the court below. It does not suggest any disagreement between the D.C. Circuit and the Sixth Circuit on the legal threshold for triggering a hearing opportunity under the AEA.

III. PETITIONERS' CLAIM REGARDING THE SIXTH CIRCUIT'S ANALYSIS OF WHETHER THE NRC NEEDED TO CONDUCT A SITE-SPECIFIC ENVIRONMENTAL ANALYSIS UNDER NEPA DOES NOT PRESENT AN ISSUE WORTHY OF THIS COURT'S CONSIDERATION.

Petitioners' final basis for seeking this Court's review of the Sixth Circuit's decision – their claim that the Sixth Circuit erred in concluding that the NRC did not need to conduct a "site-specific" NEPA inquiry relating to the environmental effects of spent fuel storage in the VSC-24 casks at the Palisades site, Pet. at 26-29 – does not raise any issues that are deserving of this Court's consideration.

Petitioners' claim that the NRC needed to conduct a site-specific NEPA environmental analysis relating to

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[15] *NIRS* is plainly distinguishable on the same basis. We nevertheless further note that *NIRS upheld* the NRC's decision to use a rulemaking procedure and, although petitioners suggest otherwise, made no ruling on whether adjudicatory hearings were required to show a linkage between a certified general design and the site-specific design. In the quotation emphasized by petitioners, the D.C. Circuit was simply *describing* the NRC's *own* regulatory requirements – it was not imposing any requirement on the NRC. *See* Pet. at 24; *NIRS*, 969 F.2d at 1171.

spent fuel storage in the VSC-24 casks at the Palisades site completely ignores the NRC's determination that the VSC-24 cask was safe for use at any nuclear power plant site if used under approved conditions. Given this determination, there would have been no need for the NRC to conduct a site-specific inquiry relating to the effects of use of the VSC-24 cask at the Palisades site. Since the casks will perform their intended safety function at any site coming within the terms of the general license, there was simply no need to conduct a site-specific inquiry of the type petitioners desire. Significantly, petitioners do not challenge the NRC's conclusions in this regard.[16] Even if petitioners did challenge the NRC's technical determination, such a challenge, which would involve an attempt to override the informed judgment of an agency regarding a fact-specific, technical matter coming within the agency's prescribed area of expertise, would not raise a certworthy issue. This is especially so since the NRC's determination is just the type of technical judgment that this Court has long held is entitled to great deference. *See Baltimore Gas*, 462 U.S. at 103.

Petitioners make the conclusory assertion, without explanation, that the Sixth's Circuit's analysis may be inconsistent with this Court's decision in *Baltimore Gas*. Petitioners' failure to expand on their naked assertion is no doubt because this Court in *Baltimore Gas* explicitly endorsed the NRC's use of rulemaking to address NEPA issues generically:

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[16] To be sure, petitioners do raise the letter written by an EPA employee regarding the use of the VSC-24 cask at Palisades as well as a letter written by one NRC employee raising similar concerns. Petitioners completely ignore the NRC's response to the concerns raised in these non-record letters, however, which response *confirms* the NRC's conclusion that there would be no site-specific environmental effects from use of the VSC-24 cask at the Palisades site. *See supra* at 7.

> NEPA does not require agencies to adopt any particular internal decisionmaking structure . . . The generic method chosen by the agency is clearly an appropriate method of conducting the hard look required by NEPA.

462 U.S. at 100-01 (citations omitted). *See also Vermont Yankee*, 435 U.S. at 548 (upholding the NRC's broad authority to resolve NEPA issues by rule, and noting that "the only procedural requirements imposed by NEPA are those stated in the plain language of the Act").

Petitioners are thus reduced to arguing that the Sixth Circuit's "reading" of *Baltimore Gas* conflicts with the Third Circuit's reading of that decision in *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719 (3d Cir. 1989). There simply is no such conflict between this case and *Limerick*, however. To begin with, the Third Circuit in *Limerick* was not faced with any issue regarding the interplay of NEPA with the NWPA. Thus, the Third Circuit was not faced with interpreting or applying Congress' decision, expressed in the NWPA, to have the NRC, to the maximum extent practicable, consider the licensing of on-site spent fuel storage through rulemaking. *See* 42 U.S.C. § 10198(a). *See also supra* at 21.

In *Limerick*, the Third Circuit held that the NRC could not rely on an NRC policy statement to preclude consideration of so-called severe accident mitigation design alternatives ("SAMDAs") in a proceeding considering the issuance of a full power operating license for the Limerick plant in Pennsylvania. The Third Circuit acknowledged the holding of *Baltimore Gas* and recognized, as did the parties, that the "NRC may preclude consideration of generic issues by rulemaking." 869 F.2d at 733; *see id.* at 736-37. The Court found, however, that *Baltimore Gas* was "readily distinguishable," since "in *Baltimore Gas* the NRC proceeded on the basis of a formal rulemaking, whereas in [*Limerick*], . . . the NRC promulgated the decision not to consider [SAMDAs] as a policy statement." *Id.* at 736-37. This distinction was crucial because (1) a policy

statement, unlike a rule, was entitled to no deference and (2) again unlike a rule, when an agency applies a policy statement in a particular context, the policy expressed in the statement had to be supported as if the policy statement did not exist. *Id.* at 733, 737. This crucial distinction between *Limerick* and *Baltimore Gas* does not exist in the case at bar.

Furthermore, the Third Circuit's refusal to rely on a generic environmental analysis in *Limerick* made some sense in light of the fact that the proceeding there involved the grant of an operating license. Thus, there was at that time no final, approved comprehensive environmental analysis of the Limerick site. Here, by contrast, there not only exists an in-depth environmental analysis of the Palisades site, *see Kelley*, 42 F.3d at 1519-20, but the NRC has also reached an expert conclusion, through the VSC-24 cask rulemaking, that the VSC-24 cask would perform its intended safety function at *any* applicable site if used under approved conditions.

In sum, petitioners are simply incorrect when they state that the Sixth Circuit's NEPA analysis "does not square with either the facts presented, this Court's decision in *Baltimore Gas*, or the holding of the Third Circuit in *Limerick*." Pet. at 29. Because the Sixth Circuit's NEPA analysis otherwise represents a straightforward application of well-settled principles, the Sixth Circuit's decision presents no occasion for the exercise of this Court's powers of review.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: May 12, 1995

APPENDIX

42 U.S.C. § 10153 (Nuclear Waste Policy Act) ...App. 1

Letter from Gerald B. Slade to NRC .....App. 2
August 17, 1990

Letter from NRC to Robert A. Fenech.....App. 4
September 20, 1994

42 U.S.C. § 10153

NUCLEAR WASTE POLICY ACT

SEC. 133. The Commission shall, by rule, establish procedures for the licensing of any technology approved by the Commission under section 10198(a) for use at the site of any civilian nuclear power reactor. The establishment of such procedures shall not preclude the licensing, under any applicable procedures or rules of the Commission in effect prior to such establishment, of any technology for the storage of civilian spent nuclear fuel at the site of any civilian nuclear power reactor.

August 17, 1990

Consumers Power
Covert, MI 49043

Director, Division of Industrial
and Medical Nuclear Safety
Office of Nuclear Material
Safety and Safeguards
United States Nuclear
Regulatory Commission
Washington, D.C. 20555

DOCKET 72-7 – PALISADES PLANT – WITHDRAWAL OF LICENSE APPLICATION FOR AN INDEPENDENT SPENT FUEL STORAGE INSTALLATION AT THE PALISADES NUCLEAR PLANT

On March 9, 1990, Consumers Power Company submitted a license application for an Independent Spent Fuel Storage Installation at the Palisades Plant in accordance with 10 CFR Part 72. On May 31, 1990, the company submitted an Environmental Report in support of the application. The Commission published notice of opportunity for hearing on the application on July 13, 1990 (55 FR 28853).

On July 18, 1990, the Commission published notice of adoption, effective August 17, 1990, of amendments to Part 72 to provide for the storage of spent nuclear fuel at any power reactor site under a general license, if certain conditions are satisfied.

Meanwhile, a number of petitions to intervene with respect to Consumers Power Company's pending Part 72 application have been filed. We believe the need for a site-specific proceeding is mooted by adoption of the new

rule. Accordingly, this is to notify you that the Company hereby withdraws its March 9, 1990 application, and that it intends to utilize the general license granted in new Subpart K when it is able to satisfy the conditions of the general license. By copy of this letter, we are so advising all those whose intervention petitions we have received.

/s/

Gerald B. Slade
General Manager

cc: Petitioners

UNITED STATES
NUCLEAR REGULATORY COMMISSION

September 20, 1994

Mr. Robert A. Fenech
Vice President, Nuclear Operations
Consumers Power Company
Palisades Plant
27780 Blue Star Memorial Highway
Covert, MI 49043

SUBJECT: PALISADES PLANT – NRC FINAL SAFETY ASSESSMENT OF INDEPENDENT SPENT FUEL STORAGE INSTALLATION (ISFSI) SUPPORT PAD (TAC NO. M88875)

Dear Mr. Fenech:

In May 1993, NRC issued a certificate of compliance, pursuant to 10 CFR Part 72, to Sierra Nuclear Corporation (SNC), approving the use of the VSC-24 cask, for a 20-year term, by holders of 10 CFR Part 50 licenses, as an ISFSI. The VSC-24 cask was first used under the general license by the Consumers Power Company (CPCo) at the Palisades plant in Michigan. Since that time, questions were raised about the possible effects of earthquakes and erosion at the Palisades site on the safe storage of spent fuel in the VSC-24 dry casks. On the basis of these concerns, in March 1994, NRC initiated an independent assessment to more closely examine the behavior of the pad at Palisades with respect to seismic and other natural hazards in order to address concerns that have been raised subsequent to the construction and initial use of the facility. The staff's preliminary findings are described

in a draft safety assessment (DSA) forwarded to you on May 18, 1994.

On May 23, 1994, a public meeting was held with CPCo in Benton Harbor, Michigan, to discuss CPCo's examination of the dry cask storage pad and NRC's independent assessment of that examination. Since that meeting, NRC continued to address comments and questions received from the public regarding the dry cask storage at Palisades. The enclosed final safety assessment (FSA) contains the results of the NRC independent examination of the location of the foundation for the ISFSI at Palisades. Attached to the FSA are NRC responses to the appropriate comments and questions on this issue.

After careful consideration of the public comments and the technical evaluations performed by CPCo and by NRC's consultants, the staff's FSA concludes that the location of the storage pad at the Palisades site is acceptable to support the concrete storage cask against all effects of the design-basis earthquake for the site, and against other such postulated natural hazards as high winds and floods. Furthermore, the VSC-24 dry casks and the concrete storage pad will not pose any unacceptable risk to public health and safety because of substantial horizontal and vertical separation of the ISFSI from the lake shore, the installed shoreline protection, surveillance and monitoring programs established by CPCo, and the ability to take remedial measures to remove sand deposited by wind or water. We recognize that your surveillance and monitoring programs further ensure safe operation of the dry cask storage. Please keep the records of your surveillance available for future NRC review. The NRC staff reviewed CPCo's analyses and determined that

its conclusions are similar to those of NRC. Please contact the NRC Project Manager, Mr. Tony Hsia, at (301) 504-3028, if you have any questions.

Sincerely,

/s/

Ledyard B. Marsh, Project Director
Project Directorate III-1
Division of Reactor Projects – III/IV
Office of Nuclear Reactor Regulation

Docket No. 50-255

Enclosure: Final Safety Assessment, w/attachments